

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

RPM PIZZA, LLC,)	
)	
Petitioner,)	
)	
v.)	CASE NO. _____
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent.)	

**PETITION FOR REVIEW OF A DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

Notice is hereby given, this 28th day of December, 2015, that Petitioner RPM Pizza, LLC, hereby petitions the United States Court of Appeals for the Fifth Circuit for review of the Decision and Order of Respondent National Labor Relations Board, entered the 22nd day of December, 2015, and reported at 363 N.L.R.B. No. 82 (2015), attached hereto.

This Court has jurisdiction over this petition for review pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), because the NLRB's Decision and Order is a final order, Petitioner is a party aggrieved by the Decision and Order, and Petitioner transacts business in this circuit by operating locations in Louisiana and Mississippi.

[Signature block on following page.]

s/ Steven M. Bernstein

Steven M. Bernstein

FISHER & PHILLIPS LLP

101 East Kennedy Blvd.

Suite 2350

Tampa, FL 33602

Phone (813) 769-7500

Fax (813) 769-7501

sbernstein@laborlawyers.com

COUNSEL FOR PETITIONER

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

RPM PIZZA, LLC,)	
)	
Petitioner,)	
)	
v.)	CASE NO. _____
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent.)	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

RPM Pizza, LLC – RPM Pizza, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Fisher & Phillips LLP

Dale Firmin

Weinhaus & Potashnick

Mark Potashnick, Esq.

The National Labor Relations Board (NLRB)

Beauford D. Pines, Counsel for General Counsel of the NLRB

Paul McInnes LLP

Jack McInnes, Esq.

Rick Paul, Esq.

s/ Steven M. Bernstein

Steven M. Bernstein

FISHER & PHILLIPS LLP

101 East Kennedy Blvd.

Suite 2350

Tampa, FL 33602

Phone (813) 769-7500

Fax (813) 769-7501

sbernstein@laborlawyers.com

COUNSEL FOR PETITIONER

Dated this 28th day of December, 2015.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

RPM PIZZA, LLC,)	
)	
Petitioner,)	
)	
v.)	CASE NO. _____
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2015, I filed a Petition for Review of a Decision and Order of the National Labor Relations Board and a Certificate of Interested Persons along with sufficient copies to be served by the clerk upon the individuals identified below, and served additional copies on the following individuals by U.S. Mail:

M. Kathleen McKinney
Regional Director
National Labor Relations Board, Region 15
600 South Maestri Place
New Orleans, LA 70130-3413
kathleen.mckinney@nlrb.gov

Mark A. Potashnick, Esq.
Weinhaus & Potashnick
11500 Olive Blvd., Suite 133
St. Louis, MO 63141
markp@wp-attorneys.com

Beauford D. Pines
Counsel for General Counsel
National Labor Relations Board, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130
bpines@nlrb.gov

Jack D. McInnes, V, Esq.
Paul McInnes LLP
Ste 100
2000 Baltimore
Kansas City, MO 64108
mcinnes@paulmcinnes.com

Richard M. Paul, III, Esq.
Paul McInnes LLP
Ste 100
2000 Baltimore
Kansas City, MO 64108
paul@paulmcinnes.com

s/ Steven M. Bernstein
Steven M. Bernstein
FISHER & PHILLIPS LLP
2300 SunTrust Financial Centre
401 E. Jackson Street
Tampa, FL 33602
(813) 769-7513
sbernstein@laborlawyers.com

COUNSEL FOR PETITIONER

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

RPM Pizza, LLC and Dale Firmin. Case 15–CA–113753

December 22, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On July 11, 2014, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board’s decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated 8(a)(1) by maintaining, threatening to enforce, and enforcing an arbitration policy (“Arbitration Agreement”) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.¹ In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in part, *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, ___ F.3d ___, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), the Board affirmed the relevant holdings of *D. R. Horton*.²

The Board has considered the decision and the record in light of the exceptions³ and briefs and, based on the

judge’s application of *D. R. Horton* and our subsequent decision in *Murphy Oil*, we affirm the judge’s rulings, findings, and conclusions, and adopt the recommended Order as modified and set forth in full below.

We adopt the judge’s finding that the Respondent unlawfully enforced the Arbitration Agreement by (1) threatening to file a motion to dismiss Charging Party Firman’s class action complaint in United States District Court, Southern District of Mississippi Southern Division, alleging violations of the Fair Labor Standards Act if Firmin did not withdraw this complaint, and (2) by its motion to dismiss the class arbitration action Firman filed with the American Arbitration Association (AAA).⁴ As to the latter, we note that the Respondent advised the

on behalf of a class of employees). We reject this argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

We also reject the Respondent’s and our dissenting colleague’s argument that the opt-out provision of its Arbitration Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule set forth in *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration agreement not a condition of employment (or nonmandatory), an arbitration agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity.

Our dissenting colleague also observes that the Act “creates no substantive right for employees to insist on class-type treatment of non-NLRA claims.” This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, 16 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does “create[] the right to pursue joint, class, or collective claims if and as available without the interference of an employer-imposed restraint.” *Murphy Oil*, slip op. at 16–17 (emphasis in original). The Respondent’s arbitration policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague’s view that finding the arbitration policy unlawful runs afoul of employees’ Section 7 right to “refrain from” engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

⁴ We reject the Respondent’s argument that Firmin was not engaged in concerted activity in filing his class action lawsuit. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), “the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore protected by Section 7.” *Id.*, slip op. at 2. See also *D. R. Horton*, slip op. at 3. For the reasons set forth by the judge, we also reject the Respondent’s argument that its letter threatening to enforce the Arbitration Agreement if Firmin did not dismiss his lawsuit, and its motion to dismiss his class arbitration action, was protected by the First Amendment. See *Murphy Oil*, supra, slip op. at 20–21 and *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

¹ In so finding, the judge stated inadvertently that the Respondent “did the opposite of what the Board in *D. R. Horton* specifically forbid[s]”, rather than stating that the Respondent “did exactly what the Board in *D. R. Horton* forbids.”

² The Respondent argues that the Board had only two valid members at the time *D. R. Horton* issued because, in the Respondent’s view, the recess appointment of then-Member Becker was constitutionally invalid under *NLRB v. Noel Canning*, 134 S.Ct 2550 (2014), and that the Board therefore lacked a quorum. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We reject this argument for the reasons set forth in *Murphy Oil*, slip op. at 2 fn. 16. See also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D. C. Cir. 2014) (holding that the “President’s recess appointment of Member Becker . . . was constitutionally valid.”)

³ The Respondent argues that its arbitration agreement includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. Cf. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013) (court stated, in dicta, that the arbitration agreement did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit

AAA that the Arbitration Agreement to which Firmin was bound, and which we find is unlawful, expressly waived class arbitration as well as all other class and collective actions. Thus, by enforcing the Arbitration Agreement through this motion to preclude class arbitration, and threatening Firmin that the Arbitration Agreement would be enforced to preclude pursuit of his class action lawsuit, the Respondent effectively and unlawfully prohibited class and collective actions in all forums, judicial and arbitral. By doing so, the Respondent was not “free to insist that [the] arbitral proceedings be conducted on an individual basis.” *D. R. Horton*, supra, slip op. at 12.⁵

⁵ This case is distinguishable from *Citigroup Technology, Inc.*, 363 NLRB No. 55 (2015), which involved only a class arbitration action filed by a former employee who had not previously filed a class or collective employment action in court regarding his employment claims. The Board found that because the respondent had not sought to preclude a collective court action, it did not unlawfully enforce its arbitration policy by requesting the AAA to dismiss the collective arbitration action. Thus, unlike the Respondent here who unlawfully closed off both judicial and arbitral forums to employees to pursue their collective employment claims, the respondent in *Citigroup* had not yet closed off the judicial forum and thus was free to insist on individual arbitration.

As set forth in the judge’s decision, Firmin’s lawsuit was dismissed without prejudice and his class arbitration action was settled and dismissed with prejudice. The Respondent argues, therefore, that because there was no longer “any legitimate case or controversy,” the judge erred in affirming the Regional Director’s denial of Firmin’s request to withdraw his Board charges. We reject this argument for the reasons set forth in *Flyte Tyme Worldwide*, 362 NLRB No. 46 (2015).

Because the lawsuit has been dismissed, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to remedy the Sec. 8(a)(1) enforcement violation by notifying the court that it no longer opposes Firmin’s lawsuit. However, consistent with our decision in *Murphy Oil* (slip op. at 21), we shall amend the judge’s decision and order the Respondent to reimburse Firmin and all other plaintiffs for all reasonable expenses and legal fees, with interest, in connection with dismissing his lawsuit pursuant to the Respondent’s unlawful threat to seek dismissal of his lawsuit and in connection with the Respondent’s motion to dismiss his class arbitration action filed with the American Arbitration Association. See *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) (“If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys’ fees and other expenses” as well as “any other proper relief that would effectuate the policies of the Act.”). See also *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 4 (2011) (awarding “reasonable legal expenses and fees” associated with charging parties’ defense of arbitration award), enfd. sub nom. *Standard Drywall, Inc., v. NLRB*, 547 Fed. Appx. 809 (9th Cir. 2013). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) (“[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses”), enfd. 973 F.2d 230 (3d Cir. 1992), cert denied 507 U.S. 959 (1993).

ORDER

The National Labor Relations Board orders that the Respondent, RPM Pizza, LLC, Gulfport, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, threatening to enforce, and/or enforcing an arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms, to make clear to employees that the Arbitration Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement in any form that it has been rescinded or revised, and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in this decision, reimburse Dale Firmin and all other plaintiffs for any reasonable attorneys’ fees and litigation expenses that they may have incurred in dismissing the Federal lawsuit pursuant to the unlawful threat by the Respondent to seek dismissal of the lawsuit and in opposing the motion to dismiss Firmin’s class arbitration action filed with the American Arbitration Association.

(d) Within 14 days after service by the Region, post at its Destrehan, Louisiana facility copies of the attached notice marked “Appendix A,” and at all other facilities where the unlawful Arbitration Agreement is or has been in effect, copies of the attached notice marked “Appendix B.”⁶ Copies of the notices, on forms provided by the Regional Director for Region 15, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked Appendix A to all current employees and former employees employed by the Respondent at its Destrehan, Louisiana facility at any time since March 21, 2013. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked “Appendix B” to all current employees and former employees employed by the Respondent at those facilities at any time since March 21, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 22, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent’s arbitration agreement (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims, even though the Agreement gives employees the right to opt out of the waiver. Charging Party Dale Firmin electronically signed the Agreement, he did not exercise his right to opt out, and later he filed a class action lawsuit against the Respondent in Federal court alleging violations of the minimum-wage provisions of the Fair Labor Standards Act (FLSA). In reliance on the Agreement, the Respondent sent a letter to Firmin’s counsel asserting that Firmin’s FLSA claims must be arbitrated. In that letter, the Respondent stated that unless Firmin voluntarily withdrew his complaint, the Respondent would file a motion to

dismiss it. Firmin subsequently voluntarily dismissed his Federal court complaint without prejudice. Afterward, Firmin pursued his FLSA claims by filing with the American Arbitration Association (AAA) an Arbitration Demand and Statement of Claim individually and on behalf of a purported class of similarly situated individuals. In further reliance on the Agreement, the Respondent filed with the arbitrator a motion to dismiss Firmin’s class allegations. The parties settled Firmin’s FLSA dispute before the arbitrator ruled on the motion to dismiss. My colleagues find that the Respondent unlawfully threatened to enforce the Agreement by sending the letter and unlawfully enforced the Agreement by filing its motion to dismiss with the arbitrator. I respectfully dissent from these findings and from the finding that the Agreement itself violates the Act for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.² However, I disagree with my colleagues’ finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board’s finding here, similar to the Board majority’s finding in *On Assignment Staffing Services*,³ that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”⁴ This aspect of Sec-

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority’s holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, __ F.3d __, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

² I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

⁴ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of em-

tion 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁵ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;⁶ (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);⁷ and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based

employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁵ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

⁶ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, No. 14–CV–5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

⁷ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.⁸ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.⁹

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to inform Firmin by letter that it would seek to enforce the Agreement by filing a motion to dismiss in Federal court unless Firmin voluntarily withdrew his complaint and by later filing with the arbitrator a motion to dismiss his class allegations. My colleagues' finding that the Respondent acted unlawfully in moving to dismiss the class allegations from the arbitral proceeding is particularly unjustified. Under the Agreement, both parties—employee and Respondent—waive class arbitration, and the Supreme Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed to do so*." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662,

⁸ The class-action waiver agreements were voluntarily signed, even though the Respondent was willing to hire applicants only if they entered into the agreements. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is non-mandatory, it is still unenforceable. See *On Assignment Staffing Services*, above (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right to *choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

⁹ Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enf. denied* in part, 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

684–685 (2010). Thus, contrary to my colleagues’ decision, the Respondent *was* permitted to file its motion in the arbitration case seeking to dismiss any class allegations. Moreover, in the arbitration case, I believe it is clear that the arbitrator—not the NLRB—was empowered to determine whether or not Respondent’s motion should be granted. Finally, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and all other plaintiffs for any reasonable attorneys’ fees and litigation expenses they may have incurred in dismissing the Federal lawsuit and in opposing the motion to dismiss the class allegations from the arbitral proceeding. As to the federal lawsuit, Firmin moved for dismissal *voluntarily*; and to the extent he did so based on the letter informing Firmin that the Respondent was prepared to file a motion to dismiss his lawsuit, the monetary remedy is still improper because such a motion would have been lawful.¹⁰ As to the arbitration, the motion was lawful, so any monetary remedy is unwarranted.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 22, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

¹⁰ That a motion to compel arbitration and dismiss Firmin’s lawsuit would have been reasonably based is supported by court decisions that have enforced similar agreements. See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, above; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013). And because the motion would have been based on the Agreement, which is lawful, it would not have fallen outside the protection of the First Amendment’s Petition Clause on the basis that the motion would have had an “illegal objective.” See *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983); see also *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35 (Member Miscimarra, dissenting in part).

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, threaten to enforce and/or enforce an arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the Arbitration Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement in any form that that the Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL reimburse Dale Firmin and all other plaintiffs for any reasonable attorneys’ fees and litigation expenses that they may have incurred in dismissing the Federal lawsuit in response to our unlawful threat to seek dismissal of his lawsuit and in opposing the motion to dismiss Firmin’s class arbitration action filed with the American Arbitration Association.

RPM PIZZA, LLC

The Board’s decision can be found at www.nlr.gov/case/15-CA-113753 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain, threaten to enforce, and/or enforce an arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the Arbitration Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement in any form that that the Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

RPM PIZZA, LLC

The Board's decision can be found at www.nlr.gov/case/15-CA-113753 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Beauford D. Pines, Esq., for the General Counsel.
Michael D. Carrouth, Esq., J. Hagood Tighe, Esq., and Reyburn W. Lominack, III, Esq. (Fisher & Phillips, LLP), of Columbia, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. Based on a charge filed by Dale Firmin (Charging Party or Firmin) on September 20, 2013, and an amended charge filed on December 6, 2013, the Region Director of the National Labor Relations Board (NLRB) issued a complaint and notice of hearing on December 31, 2013. An amended complaint (the complaint) was issued on January 16, 2014. The complaint alleges that RPM Pizza, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an arbitration agreement that requires employees to waive any rights to resolution of any employment-related disputes by class or collective actions in any forum, judicial or arbitral. The complaint also alleges that Respondent violated Section 8(a)(1) in this manner by demanding that Charging Party Dale Firmin (Firmin) relinquish his class or collective action claim filed in federal court or face attorney's fees, costs, and losses, and when it moved to have Firmin's class arbitration claim dismissed. The Respondent filed an answer (and amended answer) denying that it engaged in the unfair labor practices alleged and asserting a variety of affirmative defenses.

On April 4, 2014, I granted the parties' joint motion to submit this case to me for a decision on stipulated facts, thus waiving a hearing under Section 102.35 (a)(9) of the Board's Rules and Regulations. Thereafter, the parties filed briefs, which I have read and considered.

Based upon the entire stipulated record, and after thoroughly considering both parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated to the following facts as to the nature of the Respondent's business and jurisdiction:

1. At all material times, Respondent, has been a limited liability company incorporated in Mississippi, and with a principal place of business in Gulfport, Mississippi. Respondent conducts business in several locations including Destrehan, Louisiana, where it engages in the retail sale of pizza and related products.¹

¹ Respondent operates stores in various locations in at least three states, Alabama, Louisiana, and Mississippi. (See Jt. Exh. 1.) As set

2. During the 12 months prior to the submission of the stipulated record, Respondent derived revenues in excess of \$500,000, and has directly purchased and received at its Destrehan, Louisiana store goods and products in excess of \$5000 from suppliers located outside the State of Louisiana.

3. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Stipulated Background Facts

1. Respondent's arbitration agreement

In 2011, Respondent RPM introduced an arbitration procedure, including an arbitration agreement (AA), that provided that Respondent and all of its employees must submit, with certain exceptions set forth therein, all claims, disputes, and controversies that either party may have against the other to binding arbitration. Specifically, this AA provides in pertinent part the following:²

B. Claims Excluded from Binding Arbitration.

Nothing herein shall prevent Team Member from filing and pursuing administrative proceedings before the U.S. Equal Employment Opportunity Commission or an equivalent state or local agency to the full extent as permitted by law notwithstanding the existence of an agreement to arbitrate. Although, if Team Member chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to arbitration. Likewise, nothing in this Agreement prevents a party from participating in any investigation or proceeding conducted by any administrative agency. Nothing herein shall prevent Team Member or Company from a temporary restraining order or preliminary injunctive relief to preserve the status quo or prevent any irreparable harm pending the arbitration of the underlying claim, dispute and/or controversy. The only exceptions to the mandatory arbitration provision, besides those listed in this paragraph, are as follows:

- (1) Any claim, dispute, and/or controversy arising under the National Labor Relations Act ("NLRA") that are brought before the National Labor Relations Board;
- (2) Any claim, dispute, and/or controversy for medical and disability benefits under Workers' Compensation or any claim for Unemployment Compensation filed with the state that the Team Member resides in;
- (3) Any claim, dispute, and/or controversy on an individual

forth below, Firmin applied to and was hired to work in the Destrehan, Louisiana store.

² Respondent also refers to all of its employees as "Team Members." In Respondent's AA, "Team Member" includes all of Respondent's employees in all offices and store locations, from top-level management officials (e.g. vice presidents, managing directors, regional directors) to local store managers, and to all non-management employees such as drivers. (See Jt. Exh. 1).

basis only which are brought properly in, and only to the extent they remain in, small claims court;

(4) Any claim, dispute, and/or controversy arising out of any other written contract(s) between Team Member and the Company where the contract specifically provides for resolution through the courts; and

(5) Any claim, dispute, and/or controversy for benefits under a Company plan in which the plan provides its own arbitration procedure (such as a claim involving a Company health plan in which the health provider has its own arbitration procedure agreed to by the Team Member).

III. Arbitration Procedure.

....

A. Form of Arbitration and Waiver of Multi-Plaintiff Litigation. In any arbitration, any claim shall be arbitrated only on an individual basis and not on a class or private attorney general basis. Team Member and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action, or in or pursuant to a private attorney general capacity, and there shall be no joinder or consolidation of parties. All arbitration shall be brought on a separate and individual basis. This waiver does not prohibit a Team Member's right to act in concert with other applicants or Team Members under the NLRA, and Team Members will not be subject to discipline or relation for challenging this waiver of multi-plaintiff litigation through a class or collective action.

....

IV. Dismissal of Any Lawsuit. [T]he Company and Team Member agree that if either pursues a covered claim against the other by any method under than the arbitration provided herein, and an exception does not apply, the responding party is entitled to a dismissal, stay and/or injunctive relief regarding such action, and the recovery of all damages in responding, to include related attorney's fees, costs, and losses.

V. Waiver of Jury Trial. TEAM MEMBER AND THE COMPANY UNDERSTAND THAT BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH GIVE UP THEIR RIGHT TO TRIAL BY JURY OF ANY INDIVIDUAL, CLASS, COLLECTIVE ACTION, MULTIPLE-PARTY, PRIVATE ATTORNEY GENERAL, OR OTHER CLAIM EITHER MAY HAVE AGAINST THE OTHER, EXCEPT AS EXPRESSLY PROVIDED HEREIN.

VI. Exclusive Opt-Out Right. The Team Member has the right to opt out of the obligation set forth herein to submit to binding arbitration. To opt out, the Team Member must send via electronic mail or first-class mail, within thirty (30) calendar days of signing this Arbitration Agreement, an email/letter addressed to glennm@rpmpizza.com or mail to Glenn A. Mueller, 15384 5th Street, Gulfport, MS 39503 stating that the Team Member has elected to opt out of the

Arbitration Agreement. The email/letter must clearly state the Team Member's name and must be signed by the Team Member. Absent the proper and timely exercise of this opt-out right, the Team Member will be required to arbitrate all disputes covered by this Arbitration Agreement.

....

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. I UNDERSTAND THAT, UNLESS I TIMELY SEND THE OPT-OUT LETTER REFERENCED ABOVE TO THE PROPER ADDRESSEE, I WILL BE REQUIRED TO ARBITRATE ALL DISPUTES WITH THE COMPANY THAT ARE COVERED BY THIS ARBITRATION AGREEMENT.

(Jt. Exh. 1.)³

In summary, and relevant to this matter, Respondent's AA requires that all employment-related disputes with its employees be resolved as individual claims exclusively through final arbitration. In other words, parties to a dispute cannot pursue claims related to the dispute, individually or collectively, or by class, in any judicial or court forum. If a party does file such an action, the responding party can bring a dismissal, stay, and/or injunctive relief regarding such action, and recover all damages in responding, to include related attorney's fees, costs, and losses. The AA specifically excludes "[a]ny claim, dispute, and/or controversy arising under the National Labor Relations Act (NLRA) that are brought before the National Labor Relations Board." Finally, the AA includes an opt-out provision, provided the employee/team member opts out in writing pursuant to the terms of the AA within 30 calendar days of signing the AA via email or letter addressed to Respondent's chief executive officer, Glenn A. Mueller (Mueller).⁴

2. Roll out of Respondent's arbitration procedure and agreement

Respondent's roll out of its new AA process included inviting employees to question and answer sessions conducted by district managers, as well as other several face-to-face meetings with employees from February through June 2011, in which Respondent explained the new process and gave its employees copies of the AA and an applicant acknowledgement form. These communications also included a memorandum issued by its controller, Jeanne Quesenberry (Quesenberry), to store employees during this same period, and to office staff who do not work in the stores in August 2011, that generally explained the arbitration procedure, and its opt-out process, along with various benefits of "final and binding" arbitration (i.e., elimination of the costs and delay associated with long trials and provision

of "a fair and reasonable judgment by an outside legal party"). The memorandum also notified then employed employees that the AA was voluntary for all employees hired prior to January 1, 2011. (R. Exhs. 1-3; Jt. Exh. 1.) Of note, between September 8, 2011, and November 14, 2011, nine employees submitted email messages or letters expressing their desire to opt out of the AA.

Regarding applicants for employment on January 1, 2011, and thereafter, Respondent has required them to review information about its arbitration procedure and AA as part of its on line application process. Although applicants may view the AA from an outside computer, in completing the on line application process, they must meet with the store manager and, using Respondent's computer in the store manager's office, complete the application process. In completing the application or on boarding process, applicants must click on the screen to indicate that they have read and agree with the AA before the computer will proceed to the next screen. Applicants confirm their understanding and acceptance of and agreement with the AA with an electronic signature and date on an applicant acknowledgment form. (R. Exh. 4-5.) Mueller authorizes Respondent's on line process.

3. Charging Party Firmin

Firmin worked for Respondent as a pizza delivery driver on five different occasions between January 2001 and January 1, 2013. His most recent employment period began in November 2012. On November 21, 2012, Firmin met with Store Manager Scott Green (Green) at Respondent's Destrehan, Louisiana store.⁵ At Green's direction, but not in his presence, Firmin completed his on line application using the computer in Green's office. As a part of this application process, Firmin electronically signed the AA, acknowledging that he read and agreed with it as required for employment. His signature also acknowledged that he understood the opt-out procedures offered in the AA. (Jt. Exh. 1.) He did not ask Green if he could be hired without electronically signing the AA, nor did he ask any other questions about the AA. Green in turn did not inform Firmin that he could be hired if he did not electronically sign the AA. Firmin was hired, and began working for Respondent as a pizza delivery driver at Respondent's Destrehan, Louisiana store. Firmin did not subsequently inform Respondent that he wished to opt out of the AA.

On January 1, 2013, Firmin voluntarily resigned from his employment with Respondent.

On July 23, Firmin filed a complaint against Respondent in the United States District Court, Southern District of Mississippi Southern Division, alleging violations of the Fair Labor Standard Act's (FLSA) minimum wage provisions. (Jt. Exh. 2.) He filed this complaint both individually and on behalf of a class of similarly situated delivery drivers. On August 15, Respondent's counsel sent a letter to Firmin's counsel, notifying him of the AA.⁶ (Jt. Exh. 3.) This letter explained that the

³ Abbreviations used in this decision are as follows: "Tr." For transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

⁴ At all material times, Glenn A. Mueller (Mueller), chief executive officer/managing member, has been Respondent's supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act.

⁵ At all material times, Scott Green (Green), store manager, has also been one of Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act.

⁶ At all times material, Respondent's counsel has been its agent within the meaning of Sec. 2(13) of the Act.

claims in Firmin's federal court complaint were specifically covered by the AA signed by Firmin, including a waiver of the right to arbitrate as a class representative or class member in a collective action, or otherwise. Respondent's counsel also requested that that Firmin dismiss the federal court claim on behalf of Firmin and other similarly situated employees, and if Firmin desired, pursue his individual claim pursuant to the terms of the AA. He explained that if Firmin did not dismiss his federal court complaint, that Respondent would be entitled to the recovery of all damages in responding to the lawsuit, to include attorney's fees, costs, and losses. Subsequently, on August 29, Firmin voluntarily dismissed the federal court complaint, without prejudice. (Jt. Exh. 4.)

On September 17, Firmin filed an Arbitration Demand and Statement of Claim individually and on behalf of a purported class of similarly situated individuals with the American Arbitration Association (AAA). (Jt. Exh. 5.) On October 22, Respondent filed an answer to Claimant's statement of claim and a motion to dismiss regarding Firmin's class action allegations filed with the AAA. (Jt. Exh. 6.) The motion to dismiss was never decided; rather, on December 26, the presiding arbitrator issued an order granting the parties' joint motion to approve settlement that included a settlement of all claims by Firmin. (Jt. Exh. 7.)

On December 26 (and thereafter), Firmin's underlying unfair labor practice charge in the instant case was still pending before the NLRB's Regional Office.⁷

III. PARTIES' STIPULATED ISSUES

Whether Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act by generally maintaining and enforcing the terms of the AA that precludes class or collective actions, and by:

1. Enforcing the terms of the AA by requiring Charging Party Firmin to relinquish his class claim in the United States District Court, Southern District of Mississippi Southern Division (federal court) and threatening the payment of attorney's fees, costs, and losses if the lawsuit was not dismissed.
2. Filing a motion to dismiss Charging Party Firmin's class arbitration claim and requesting that the AAA dismiss the claim based on the class and collective action waiver in Respondent's AA.

IV. DISCUSSION AND ANALYSIS

As indicated above, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by maintaining its AA, which precludes employees from filing class or collective arbitrations or lawsuits, by requiring Firmin to relinquish his federal class action complaint filed on his and other employees' behalf and by filing a motion to dismiss class allegations with the AAA. I agree and find the violations alleged.

⁷ Although not included in the stipulated facts, I note that Firmin, through his counsel, served a written, formal request to withdraw his initial and amended charges filed with the Region. This request was denied. (R. Exh. 6.)

A. The Positions of the Parties

The General Counsel argues, and I agree, that this matter is controlled by the Board's holding in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), which was denied enforcement in relevant part, 737 F.3d 344 (5th Cir. 2013). In that case, the Board held that an employer violates Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement "requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial," because "the right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 NLRB No. 184, slip op. at 12. The Board also concluded that its finding was "consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy," and did not "conflict with the letter or interfere with the policies underlying the Federal Arbitration Act (FAA)." *Id.* at 10. Thus, the General Counsel contends that such a ban on employees' rights to pursue class and/or collective actions, as contained in Respondent's AA, unlawfully interferes with employees' Section 7 rights. The General Counsel also argues that although Respondent's AA excepts claims filed with the NLRB and includes an opt-out provision, such exceptions do not insulate Respondent from prohibitions established in *D. R. Horton*.

Respondent disputes the controlling effects of the Board's decision in *D. R. Horton*, arguing that it is not viable based on current Supreme Court precedent, the United States Court of Appeals for the Fifth Circuit's partial overruling of *D. R. Horton*; and numerous state and federal courts' rejection of the Board's reasoning and findings set forth in *D. R. Horton* and their refusal to invalidate arbitration agreements containing class action waivers. Respondent also asserts that the terms of its AA in this case are distinguishable from the mutual arbitration agreement analyzed in *D. R. Horton* because its AA expressly excludes claims that are brought before the NLRB, includes an opt-out provision which renders the AA and class and collective action waiver voluntary, and allows its employees to act in concert with other applicants or employees under the NLRA. Respondent further argues that Section 7 of the Act does not provide Firmin or any other of its employees the right to pursue class or collective action litigation in any forum, and further, that Firmin did not engage in any protected, concerted activity by filing a class action complaint and demand for class arbitration. Finally, Respondent contends that its efforts to enforce its AA's class action waiver were constitutionally protected conduct under the First Amendment.

B. *D. R. Horton* is Controlling

Although the Fifth Circuit, as well as several other courts as set forth in Respondent's brief, disagreed with the Board's finding that a class or collective action waiver was illegal, and that such finding conflicted with the FAA, I am bound by the findings in *D. R. Horton* until either the Board or the Supreme Court specifically overturns them. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board

precedent which the Supreme Court has not reversed,” and “for the Board, not the judge, to determine whether precedent should be varied.” (citation omitted). *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enf’d. 640 F.2d 1017 (9th Cir. 1981).⁸

Similarly, I reject Respondent’s insistence that I should deviate from the Board’s findings in *D. R. Horton* because they are contrary to subsequent Supreme Court’s decisions in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012) and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). (R. Br. at 12–13). Respondent asserts that the Supreme Court in these cases has stated that the FAA mandates enforcement of arbitration agreements unless justification to override them is established by a “contrary Congressional command.” Respondent also contends that the Supreme Court has applied this principle to employment related arbitration agreements (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Granite Rock Co. v. Int’l. Brotherhood of Teamsters*, 130 S.Ct. 2847, 2858 (2010)). Although the Supreme Court has upheld the enforcement of individual mutual arbitration agreements in these and other cases, the Court has not addressed or resolved the issue of exclusive arbitration over class and/or collective actions under the Act.

Therefore, I disagree with Respondent’s view that these subsequent cases lead to a decision contrary to that of the Board’s in *D. R. Horton*. I understand, as the Board pointed out, that the FAA establishes a liberal policy favoring arbitration agreements. 357 NLRB No. 184, slip op. at 8. However, in *D. R. Horton*, the Board found that “the Supreme Court’s jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to ‘forgo the substantive rights afforded by the statute.’” Id. at 9–10, citing *Gilmer*, supra at 26.⁹ I find in this case, the NLRA is

⁸ I reject Respondent’s argument, which appears for the first time in its brief, that the Board’s decision in *D.R. Horton*, issued on January 3, 2012, is invalid since on the date of its issuance the Board lacked a quorum and was unconstitutionally constituted (R. Br. at 11–12, fn. 2, citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) and *Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S. Ct. 2861 (2013)). The Fifth Circuit rejected a similar argument made in the *D.R. Horton* case itself, albeit for technical reasons. 737 F.3d at 350–352. Further, the Board has rejected this same contention when raised in other cases. See *Belgrove Post Acute Care*, 359 NLRB No. 77, slip op. 1, fn. 1 (2013); *Bloomingtondale’s Inc.*, 359 NLRB No. 113 (2013). On June 26, 2014, the Supreme Court did issue a narrow ruling that the President’s recess appointments made on January 4, 2012, were invalid because he did not have the authority to make them. *NLRB v. Noel Canning*, 573 U.S. ____ (2014). However, the Supreme Court in *Noel Canning* addressed the recess appointments made by the President on January 4, 2012, the day after *D. R. Horton* decision issued. Moreover, I am bound by and agree with the substantive holdings and principles in *D.R. Horton*, and find, as discussed below, that they are not contrary to Supreme Court precedent, and further, are well reasoned and predicated on well established, valid Board law.

⁹ The Board distinguished *Gilmer*, in that it “addresses neither Section 7 nor the validity of a class action waiver,” and involved an individual claim and an arbitration agreement without any language specifically waiving class or collective actions. 357 NLRB No. 184, slip op. at 10, fn. 22.

neither preempted by, nor in conflict with, the FAA, because Respondent effectively precluded Firmin and other of its employees from exercising their substantive rights under Section 7 of the Act.

In *American Express Co.*, supra, the Supreme Court dismissed a claim brought by a group of merchants, that their agreement to arbitrate individual claims as the sole method of resolving disputes was invalid, and concluded that when federal statutory claims are involved, the FAA’s directive can only be “overridden by a contrary congressional command.” However, *American Express Co.* is distinguishable from the instant case because it did not involve the substantive Section 7 right of employees to collectively file class action lawsuits or arbitrations, which was the basis of the Board’s *D. R. Horton* decision. Nor did it involve, as in this case, an employer who compels its employees to waive those rights. For the same reasons, the Supreme Court’s decision in *CompuCredit*, supra, is distinguishable.¹⁰ Moreover, these general consumer litigation and commercial cases do not address the central question of how and to what extent the FAA may be used to interfere with, by way of private agreements, the fundamental substantive right of workers to engage in concerted activity established and protected by the NLRA—the gravamen of the violation here and in *D. R. Horton*.¹¹

Likewise, I reject Respondent’s reliance on the Supreme Court’s recognition in these cases that the texts of the federal statutes involved (such as the antitrust statutes in *CompuCredit*), do not “mention” class actions, and the Court’s reference to its earlier decision in *Gilmer*, in which it upheld a class action waiver even though the Age Discrimination in Employment Act (ADEA) permitted collective actions. 136 S.Ct. at 673 and 133 S.Ct. at 2311. In further contrast, the ADEA, addressed in *Gilmore*, has as its central purpose the protection of older workers from discrimination in the workplace, whereas here, the NLRA expressly mandates as its core purpose the “right to engage in collective action—including collective legal action.” of disputes challenging employment related rights of employees. See *D. R. Horton*, 357 NLRB No. 184, slip op. at 12.

C. Respondent Violated Section 8(a)(1) of the Act by Maintaining and Enforcing the Terms Of Its AA that Preclude Class or Collective actions, Notwithstanding, Exceptions Regarding NLRB Claims or Opt-out Provisions

An employer violates Section 8(a)(1) by maintaining work rules that tend to chill employee Section 7 activities. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Rules explicitly restricting Section 7 activities violate Section 8(a)(1). *Lutheran Heritage Village - Livonia*, 343 NLRB 646 (2004). But where a workplace rule does not explicitly restrict Section 7 activity,

¹⁰ The Supreme Court in *CompuCredit* invalidated an arbitration agreement waiving the ability of consumers to sue a credit card marketer and the card’s issuing bank in court for alleged violations of the Credit Organization Act (CROA).

¹¹ Both *CompuCredit* and *American Express Co.*, were decided subsequent to *D.R. Horton*, but did not mention it.

the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. *Id.* at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (DC Cir. 2007).

Indeed, the Board in *D. R. Horton* relied on these principles in finding that the mandatory arbitration agreement violated Section 8(a)(1) because it expressly restricted protected activity by requiring employees to “refrain from bringing collective or class claims in any forum.” 357 NLRB No. 184, slip op. at 5. This conclusion is based on the determination that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” *Id.* at 3. In other words, the Board in its reasoning provides that an employer may require arbitration on an individual basis if it does not preclude employees from all class or collective judicial options.

Further, the Court and Board have long held that concerted legal action addressing wages, hours, and working conditions constitute concerted protected activity under Section 7 of the Act. *D. R. Horton*, 357 NLRB No. 184, slip op. at 2–3, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (filing of a civil suit by employees is protected activity). Again, the Board has repeatedly made clear that the right to engage in collective action, including legal action, around these types of issues is a fundamental right specifically protected by the NLRA and is “the foundation on which the Act and Federal labor policy rest.” 357 NLRB No. 18, slip op. at 10. In this case, Respondent has not only prohibited collective concerted activity, but did the opposite of what the Board in *D. R. Horton* specifically forbid, expressly limiting its employees to individual arbitration as the sole venue for disputes, and requiring all employees, including those drivers referenced in Firmin’s class claim, to forgo their substantive right to collectively pursue legal action. Respondent expressly required this in its AA, and enforced it through its efforts, including threat of attorneys’ fees and costs, to get Firmin to dismiss his federal complaint and its motion to dismiss Firmin’s class arbitration claim.

Although the AA here does not restrict access to the Board, it unlawfully precludes all other substantive collective legal action in a court or arbitral forum as addressed above. In *D. R. Horton*, the mutual arbitration agreement was unlawful, not just because it restricted access to the Board, but also because it prohibited other collective legal action. Thus, I find that Respondent’s AA and its class or collective action waiver in this case violates Section 8(a)(1) not because it does or does not allow its employees to file charges with the Board, but because it interferes with and restricts its employees from engaging concerted activity, i.e., bringing class or collective action regarding employment disputes in any forum at all. The fact that Respondent’s AA provides that employees may file charges with the Board does not cure this defect or rather, make its

actions lawful.

Likewise, I disagree with Respondent’s argument that because its AA expressly allows its employees to act in concert with others, without fear of discipline (even for actually bringing class and collective claims), their Section 7 rights have been sufficiently preserved. Respondent also maintains that its AA therefore allows other non-legal action among its employees such as allowing them, for example, to discuss their individual claims, to serve as witnesses in each others’ individual actions or to assist in those actions, and to pool their resources towards those efforts. Those employees, however, would obviously be precluded, for example, from joining with employees who had opted out, consciously or by failing to meet the unreasonable 30-day deadline, to pursue resolution of employment-related disputes through litigation or arbitration. They would certainly, and reasonably, be hesitant to engage, or even chilled from engaging with, those employees who opted out, or not, to strategize regarding such matters given the otherwise prohibitive language in Respondent’s AA. Nevertheless, Respondent does not escape liability from expressly restricting its employees from filing a class or concerted action in any and all forums.

Respondent’s attempt to insulate itself from liability by way of its AA’s opt-out provision also fails. Respondent claims its AA differs from the one at issue in *D. R. Horton*, in that its one-time opt-out opportunity makes the AA voluntary, thereby rendering it lawful under the Act, and creating a balance between its goals associated with its AA and the Act. However, the purpose of the Act, to balance to the inequality of bargaining power between employees, who are not on the same standing, and employers “who are organized in the corporate or other forms of ownership association” simply cannot be ignored here. 29 USC § 102. Indeed, the very act of requiring employees, especially new employees, to affirmatively make a decision to permanently waive their future rights protected under the Act, within a short time period (30 days of employment or of signing the AA), creates a smokescreen and serves to restore the inequity the Act intends to restore. Such a requirement is also an unreasonable burden which presumes that employees will have considered, without representation, complex legal rights and consequences, many of which cannot reasonably be foreseen. It matters not, as Respondent suggests, that the Board in *D. R. Horton* did not address this issue, and in fact, referenced such an issue as presenting a “more difficult question.” 357 NLRB No. 184, slip op. at 13, fn. 28. It is clear here that the AA with its class action waiver and opt-out provision not only chills Firmin’s (and other employees’) Section 7 concerted activity, but imposes an unlawful burden on him and other employees to irrevocably relinquish certain fundamental employment rights. This is true whether employees decide to opt out or not. Further, the Board has consistently established that employees may not be required to prospectively waive their statutory rights. *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 176 (2001).

Respondent also seeks to disavow administrative law judge decisions in which the judges rejected the argument that an opt-out provision rendered an arbitration agreement voluntary, and therefore, legal under the Act. (See *R. Br.* citing, e.g. *24 Hour*

Fitness USA, Inc. (Case 20–CA–035419, Nov. 6, 2012). Although I understand that administrative law judge decisions are not precedent I agree with the reasoning in those decisions that such opt-out provisions do not preclude a finding of violation of the Act. (R. Br.) I do not agree with Respondent’s reliance on contrary administrative law judge decision, *Bloomingtondale, Inc.*, Case 31–CA–071281 (June 25, 2013), for the reasons set forth above.

Next, Respondent argues that Firmin did not engage in protected, concerted activity by filing a class action complaint and demand for class arbitration. Respondent asserts that there is no evidence that Firmin engaged in any activity “with or on authority of others,” or sought support of others before filing his complaint, and that the mere filing of a class complaint is not enough to engage protection of the Act. (R. Br.) Respondent also claims, and cites cases in support thereof, that it is necessary to present evidence that the employer had knowledge that there existed legitimate and actual evidence of concerted activity. (See R. Br. at 6.) These arguments also fail. The Board in *D. R. Horton* recognized that an individual who files a class or collective action, whether in court or through arbitration, clearly seeks to induce or initiate group action and is engaged in collective activity protected by Section 7. 357 NLRB No. 184, slip op. at 3. Moreover, the Board has long held that concerted activity can include actions of a single person who “seek[s] to initiate or to induce or to prepare for group action.” *Meyers Industries*, 281 NLRB 882, 885–887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). I agree with the Board’s recognition in *D. R. Horton*.

I also reject Respondent’s argument that its interference with Firmin’s efforts to pursue his FLSA claims in federal court (by sending its August 15, 2013 letter to Firmin’s counsel) and to dismiss Firmin’s request for class arbitration are protected by the First Amendment. Respondent’s reliance on the Supreme Court’s decision in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 (1983), is misplaced. In *Bill Johnson’s*, 461 U.S. at 737, fn. 5, the Supreme Court, in its formulation of an accommodation between Section 7 rights and the First Amendment, clearly stated that the Board could in fact enjoin a lawsuit that seeks relief that is unlawful under the NLRA, and also cited several authorities where that had been done and approved by the courts.¹² Thus, this explicit exclusion from the Court’s analysis of lawsuits with “an objective that is illegal under federal law,” applies to the instant case where I have already found that Respondent violated the Act by maintaining its AA’s class action waiver and enforcing it by using threats to influence Firmin to withdraw his federal complaint and filing a motion to dismiss his class arbitration claim. *Id.*

Finally, I reject Respondent’s assertion that this case should be dismissed because Firmin attempted to withdraw the under-

lying charge. The Regional Director obviously did not grant this request, and caused the complaint in this case to be issued.

For the foregoing reasons, I find that Respondent has been interfering with, restraining, and coercing employees in the exercise of rights of Firmin and its other employees, guaranteed under Section 7, in violation of Section 8(a)(1) of the Act by maintaining and enforcing the terms of its AA that preclude class or collective action in any forum; requiring Firmin to relinquish his class or collective claims in federal court and threatening imposition of attorney’s fees and other costs if the suit was not dismissed; and moving to dismiss Firmin’s class arbitration claim before the AAA. This is true despite the NLRB claim exception and opt-out provision contained in the AA in question.

CONCLUSIONS OF LAW

1. Respondent RPM Pizza, LLC, is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing the terms of its arbitration agreement that waives the right of its employees/team members to file and maintain class and collective actions in all forums, judicial and arbitral, Respondent violated Section 8(a)(1) of the Act.

3. By enforcing an arbitration agreement, with its class action waiver, by threatening Firmin with attorney’s fees and costs if his federal lawsuit was not dismissed, Respondent violated Section 8(a)(1) of the Act.

4. By enforcing an arbitration agreement and class action waiver by asserting the provisions thereof and filing a motion with the AAA to have Firmin’s class arbitration claim dismissed, Respondent violated Section 8(a)(1) of the Act.

5. The above violations are unfair labor practices within the meaning of the Act.

6. Respondent’s conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices set forth above, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent’s arbitration agreement is unlawful, Respondent shall be ordered to rescind or revise such arbitration agreement to make clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions, and shall notify such employees and team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

¹² Citing e.g., *Granite State Joint Board, Textile Workers Union*, 187 NLRB.636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), revd., 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB 380, 383 (1970), enf’d. in relevant part, 148 U.S. App. D.C. 119, 459 F.2d 1143 (1972), aff’d., 412 U.S. 84 (1973).

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopt-

RPM PIZZA, LLC

13

ORDER

Respondent RPM Pizza, LLC, Gulfport, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, enforcing, or seeking to enforce any arbitration agreement and/or policy that waives the right of employees/team members to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees/team members who fail to opt out.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the arbitration policy to make it clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions.

(b) Notify the employees/team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.

(c) Within 14 days after service by the Region, post at its Gulfport, Mississippi, Destrehan, Louisiana, and all other of its facilities where the AA at issue has been in effect copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2011.

(d) Within 21 days after service by the Region, file with the

ed by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2014

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a binding arbitration agreement (AA) that waives the right of employees/team members to file or maintain class or collective action in all forums, arbitral or judicial.

WE WILL NOT enforce or seek to enforce arbitration agreements by threatening employees/team members with attorney's fees or costs if they do not dismiss class or collective claims.

WE WILL NOT enforce or seek to enforce arbitration agreements by filing motions to dismiss class or collective action lawsuits or arbitrations and to compel individual arbitration pursuant to terms of the AA.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees/team members in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL NOT require our employees/team members to sign binding arbitration agreements that prohibit class and collective litigation in all forums, judicial and arbitral.

WE WILL rescind or revise the arbitration policy to make it clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions.

WE WILL notify the employees/team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.

RPM PIZZA, LLC